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In The

Supreme Court of the United States

October Term, 1973

No. 73-1269

C. JAMES LOMBARDI, JR.,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

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TABLE OF CONTENTS

	Page
Statement	1
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	4
The Factual Background	4
Petitioner is Without Funds	4

Argument:

Point I The petitioner was deprived of the Sixth Amendment right of confrontation and cross-examination so far as the key witness, Kristen Diaz Stein Campbell was concerned. Her testimony was read to the jury from a trial which concerned two crimes not involved in the instant case, namely rape and kidnapping. It was, therefore, impossible to read the cross-examination of this witness since the cross-examination was not relevant for the most part to the charges of assault, which were the sole

Contents

		Page
	predicates for the instant case. This violated the Fifth, Sixth and Fourteenth Amendments.	7
Point II	The petitioner, when arrested, was told that he was being investigated for the murders of a Professor Gallagher and a Mr. Krebs. This was a total falsehood and was used as a ruse to extract a confession, in the absence of counsel, concerning kidnapping, rape and assault.	8
Point III	We adopt the dissenting opinion of the Appellate Division, First Department, *People v. Lombardi*, 39 App. Div. 2d 700, 332 N.Y.S. 2d 749, which we ask this Court to review as another grounds for granting the petition.	9
Point IV	The Trial Court told the jurors, over exception, that there was a presumption of guilt, not innocence, [illegible] it said that the jury could acquit only if an element of the crime was *missing* beyond a reasonable doubt (T2373; T2384-2385; A1222-1224). .	10
Order of Affirmance		10
Order Extending Time to File Petition for Writ of Certiorari		11

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Brookhart v. Janis, 384 U.S. 1, 3 8

People v. Lombardi, 20 N.Y.2d 266, 39 App. Div. 2d 700, 332 N.Y.S. 2d 749 . . . . . 4, 9

Smith v. Illinois, 390 U.S. 129,131, 132 8

Statutes Cited:

28 U.S.C. Section 1257(3) 2

New York Penal Law:

Section 242(1) 1

Section 242(2) 1

United States Constitution Cited:

Fourth Amendment 3, 4

Fifth Amendment 2, 3, 4, 7, 8

Sixth Amendment 2, 3, 4, 6, 7, 8

Fourteenth Amendment 2, 3, 4, 7, 8

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THE PEOPLE OF THE STATE OF NEW YORK,

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STATEMENT

Petitioner, a person without funds, respectfully prays that this Court will issue a Writ of Certiorari to review the judgment of the New York Court of Appeals rendered the 11th day of October, 1973, affirming the order of the Appellate Division of the Supreme Court of the State of New York, First Department, which in turn had affirmed the judgment of the Supreme Court, New York County, convicting petitioner of two counts of assault second degree (former New York Penal Law Section 242(1)) and one count of attempted assault second degree (former New York Penal Law Section 242(2)), after trial before Baer, J., and a jury.

The petitioner was sentenced to *consecutive* terms of 2 to 5 years on each of the assault counts and 1 to 2 years on the attempted assault charge.

Honorable Thurgood Marshall, an Associate Justice of this Court extended petitioner's time to file a Petition for Certiorari to and including February 15, 1974.

OPINION BELOW

The Court of Appeals affirmed the judgment of conviction without opinion. The opinion of the Appellate Division is at 39 App. Div. 2d 700, 332 N.Y.S. 2d 749.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). Justice Thurgood Marshall of this Court granted an extension of time to file a Petition for Certiorari until the 15th of February, 1974, a copy of which is annexed hereto.

QUESTIONS PRESENTED

1. Whether petitioner's rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution were violated by the Trial Court's ruling that petitioner could not cross-examine, nor have produced in Court, one of the main witnesses against him, Kristen Diaz Stein Campbell, whose testimony was read from the first trial despite the fact that she was available and physically capable of coming to Court? No cross-examination could be read since the charges in the first trial included different crimes than those in the instant case.

2. Whether the Trial Court's ruling that the testimony of one of the main witnesses against the petitioner, Kristen Diaz Stein Campbell, could be read into evidence from a former trial which concerned charges of kidnapping and rape as well as assault, deprived petitioner of due process of law and confrontation, in view of the fact that the Trial Judge declined to permit any state-appointed psychiatrist to examine the witness who was functioning as a college professor and also declined any right of confrontation?

3. Whether the testimony of one of the main witnesses against petitioner, Kristen Diaz Stein Campbell, which was read into evidence, over objection from a prior trial which contained many charges not involved in the case at bar, violated petitioner's rights of confrontation and fair trial, in view of the fact that reading the cross-examination from the former trial geared to defending against some different charges, would have been highly prejudicial and therefore was foregone.

4. Whether petitioner's rights were violated by the admission of illegally seized evidence and a coerced confession at trial (Fourth, Fifth, Sixth, and Fourteenth Amendments)?

5. Whether the Trial Court's charge to the petit jury that there was a presumption of guilt rather than a presumption of innocence, violated petitioner's rights to a fair trial under the Fourteenth and Fifth Amendments?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth, Fifth, Sixth and Fourteenth Amendments, United States Constitution; Section 242(1), (2), Penal Law.

THE FACTUAL BACKGROUND

This case had been tried previously on an indictment accusing the defendant not only of assault, as is the situation in the case at bar, but, in addition, with the crimes of kidnapping and rape.

The Court of Appeals of New York reversed the conviction and threw out the kidnapping charges altogether, and the Trial Court itself had previously dismissed the rape charge. (See *People v. Lombardi*, 20 N.Y.2d 266). Opinion of the Appellate Division is reported at 39 App. Div. 2d 700, 332 N.Y.S. 2d 749.

Petitioner is Without Funds.

The petitioner operated a pharmacy in midtown Manhattan and also had a travel agency in the same premises.

The indictment alleged that he had, in essence, lured three young ladies into his employ in the travel agency, with a view toward having sexual relations with them, to facilitate which he allegedly surreptitiously administered a barbiturate to them.

We have previously submitted a copy of the brief in the Court of Appeals in connection with the application

for bail in this case and we ask that that brief be incorporated by reference herein.

The petitioner herein was assigned counsel in the Court of Appeals since he is without funds and counsel in this case as well, is representing him without funds.

It should be noted further that this Court has not ruled upon an application to permit Lombardi to petition in forma pauperis.

One of the main errors in the case involves the fact that perhaps the most virulent and articulate witness against the defendant-petitioner was a woman by the name of Kristen Diaz Stein Campbell, who claimed that she had been employed by Lombardi in his travel business and then was hoodwinked into going to Queens, New York, supposedly to attend a social function in connection with that business. She had testified at the original trial in elaborate detail concerning kidnapping, rape and assault. She was extremely descriptive in her testimony and there can be no doubt but that what she said had a tremendous impact on the jurors. At the time that the instant matter went to trial, however, this woman was functioning as an Associate Professor at St. John's University in New York, teaching English literature full time (T69-70; A44-45).*

The prosecution stated to the Court that he proposed to read Kristen Diaz Stein Campbell's testimony from the

* Numerals in parentheses bearing the prefix "T" refers to the trial transcript, and those numerals bearing the prefix "A" refer to the Appendix in the Court below.

first trial into evidence (hereinafter sometimes called "Stein").

A vehement objection was interposed on the grounds that this would deprive Lombardi of due process of law and of his right to confrontation of witnesses under the Sixth Amendment.

This witness was neither dead nor ill and was available, so it is inconceivable that the Court below should have refused to permit her to testify in person.

The defense counsel requested the right to have her examined by a physician to be appointed by the Court, but the Trial Judge refused this as well. The only hearing that was held involved the testimony of Mr. Campbell, her husband, and her own psychiatrist, Dr. Robertiello, who indicated that his entire medical record consisted of a 3 x 5 index card on which was inscribed the words "masochistic personality disorder."

Both Mr. Campbell and the Doctor admitted that Miss Stein was functioning very well, was very articulate, and conducted her business in a normal way. They merely stated that she became upset, without giving any significant details whatsoever, when she was confronted with the possibility of having to testify again.

It is submitted that the Court was very inconsistent because the Trial Judge told defense counsel that she could be subpoenaed as a defense witness, but that he would hold that she was unavailable for testimony as a prosecution witness. The Court, however, indicated that it would refuse to enforce any subpoena for her presence. No read-in of cross-examination was possible since the first trial included more serious crimes.

In addition, it should be noted that the Court refused to permit Lombardi to have a suppression hearing concerning the seizure of certain evidence at the time of his arrest, outside the presence of the jury.

We again ask this Court to note that we are incorporating by reference the brief submitted to this Court from the Court below at the time of the application for bail and ask that it be deemed part of this petition as if fully set forth, since the petitioner is without funds.

We also ask this Court to note that we are advancing all the Points set forth in the brief in the New York Court of Appeals as if fully set forth herein as well.

ARGUMENT

POINT I

The petitioner was deprived of the Sixth Amendment right of confrontation and cross-examination so far as the key witness, Kristen Diaz Stein Campbell was concerned. Her testimony was read to the jury from a trial which concerned two crimes not involved in the instant case, namely rape and kidnapping. It was, therefore, impossible to read the cross-examination of this witness since the cross-examination was not relevant for the most part to the charges of assault, which were the sole predicates for the instant case. This violated the Fifth, Sixth and Fourteenth Amendments.

We have set forth already that we are incorporating the brief in the Court of Appeals herein as if fully set forth and advance all the issues set forth therein.

Th Trial Court refused to appoint an independent physician to determine the availability of Kristen Diaz Stein Campbell as a witness, and relief exclusively upon the testimony of her own husband and her own psychiatrist, both of whom nevertheless admitted that she was functioning very well and was then actively teaching full time as an Associate Professor of English at St. John's University in New York. The psychiatrist had no medical records of treatment.

This woman was the most effective witness against Lombardi and there can be no doubt that it was impossible to cross-examine her from the record of the first trial because that trial included the charges of kidnapping and rape, which the case at bar had previously eliminated.

This, of course, deprived petitioner of his rights, under the Fourteenth, Fifth and Sixth Amendments, as to due process of law and confrontation of witnesses. (*Smith v. Illinois*, 390 U.S. 129, 131, 132, and *Brookhart v. Janis*, 384 U.S. 1, 3).

POINT II

The petitioner, when arrested, was told that he was being investigated for the murders of a Professor Gallagher and a Mr. Krebs. This was a total falsehood and was used as a ruse to extract a confession, in the absence of counsel, concerning kidnapping, rape and assault.

When arrested, Lombardi was told that the police wanted to ask him questions about the murders of Professor Gallagher and a Mr. Krebs. He was not told why he had been taken into custody and, as it turned out, the

investigation concerning Gallagher and Krebs had nothing to do with Lombardi, but was merely used as a ruse to hoodwink him into giving incriminating statements concerning kidnapping, rape and assault. He was without counsel at the time.

There were numerous other errors set forth in his brief in the New York Court of Appeals, which we ask this Court to review, since we ask this Court that they deem that brief to have been set forth *in toto* in the instant petition. Petitioner is without funds and cannot afford to reproduce them.

POINT III

We adopt the dissenting opinion of the Appellate Division, First Department, *People v. Lombardi*, 39 App. Div. 2d 700, 332 N.Y.S. 2d 749, which we ask this Court to review as another grounds for granting the petition.

Because of a lack of funds, we ask this Court to consider the dissenting opinion of the Appellate Division, First Department, in *People v. Lombardi*, 39 App. Div. 2d 700, 332 N.Y.S. 2d 749, as Point III of this petition.

POINT IV

The Trial Court told the jurors, over exception, that there was a presumption of guilt, not innocence, when it said that the jury could acquit only if an element of the crime was *missing* beyond a reasonable doubt (T2373; T2384-2385; A1222-1224).

Respectfully submitted,

IRVING ANOLIK
Attorney Assigned to Petitioner
C. James Lombardi, Jr.

ORDER OF AFFIRMANCE

COURT OF APPEALS
STATE OF NEW YORK No. 505

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

C. JAMES LOMBARDI, JR.,

Appellant.

Order Affirmed.

No opinion.

All concur.

DATED: October 11, 1973.

s/
Clerk, Court of Appeals

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

SUPREME COURT OF THE UNITED STATES

No. A-636/73

C. JAMES LOMBARDI, JR.,

Petitioner

v.

NEW YORK

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 15, 1974.

s/ Thurgood Marshall
Associate Justice of the
Supreme Court of the United States

Dated this Third
day of January, 1974.